

**NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION**

**Award No. 42698
Docket No. MW-43075
17-3-NRAB-00003-150285**

The Third Division consisted of the regular members and in addition Referee I. B. Helburn when award was rendered.

**(Brotherhood of Maintenance of Way Employees Division –
IBT Rail Conference**

PARTIES TO DISPUTE: (

**(BNSF Railway Company (Former Burlington Northern
Railway Company)**

STATEMENT OF CLAIM:

“Claim of the System Committee of the Brotherhood that:

- (1) The discipline (dismissal) imposed upon Mr. D. Newton by verbal notice from B&B Supervisor B. Gibson on January 2, 2014 was in violation of the Agreement (System File B-M-2737-E/11-14-0133 BNR).**
- (2) The claim* as appealed by the General Chairman on May 5, 2014 to General Director Labor Relations W. Osborn shall be allowed as presented because said appeal was not disallowed by General Director Labor Relations W. Osborn in accordance with Rule 42.**
- (3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimant D. Newton shall be paid for all lost time at the B&B helper rate of pay starting from January 2, 2014 until restored to service with the Carrier and he shall be made whole for any additional loss as a result of this unjust violation of the Agreement by the Carrier.**

***The initial letter of claim will be reproduced within our initial submission.”**

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

The Carrier responded timely to the Organization's claim by placing its declination with UPS for overnight delivery 58 days after receiving the claim. Even if the Organization is correct, untimeliness is not fatal, but simply subjects the Carrier to damages for the day the declination was overdue. This rules case claim can still be considered on the merits. The Carrier notified the Claimant within 60 days of his Hearing that his application was rejected. Thereafter recall under Rule 8 was meaningless because the Claimant was no longer an employee. The Claimant was dismissed during his period of temporary employment or probation, as was the Carrier's right. Should the claim be sustained, the Claimant should receive lost wages minus an offset for outside earnings.

The Organization insists that the claim should be allowed as presented because the Carrier violated mandatory time limits in issuing its declination. The Claimant's application was considered accepted because it was not rejected by November 29, 2013. He was verbally dismissed on January 2, 2014 without receiving an Investigation. The Carrier rejected the Claimant's application for promotion to Structures Carpenter, but not for his current position of B&B Helper. The Claimant was furloughed with a subsequent recall letter acknowledging his seniority rights. As the Carrier has not heretofore challenged the requested remedy, the claim should be sustained as presented because the Carrier failed to provide a Investigation.

The Claimant was hired on September 30, 2013 and furloughed on October 7, 2013. His application for employment was disapproved in writing on November 25,

2013 and signed for that day. Thereafter he was recalled on December 20, 2013 and reported for work on December 30, 2013, but was verbally dismissed on January 2, 2014. A timely unjust dismissal claim was filed by the Organization on the Claimant's behalf on January 29, 2014. The Carrier denied the claim on March 19, 2014; thus the claim was appealed to the General Director, Labor Relations on May 5, 2014. The claim was denied by letter dated July 3, 2014, shipped that day by UPS next day air, but, according to UPS records, delivered on July 7, 2014, the 61st day after the claim was filed.

The question before the Board is whether the denial of the claim violated Rule 42.A, which states in relevant part:

“ . . . Should any such claim or grievance be disallowed, the Company shall, within sixty (60) days from the date same is filed, notify whoever filed the claim or grievance (the employee or his representative) in writing of the reason for such disallowance. If not so notified, the claim or grievance shall be allowed as presented, but this shall not be considered as a precedent or waiver of the contentions of the Company as to other similar claims or grievances.”

In other words, has the Carrier complied with Rule 42.A if denial of the claim is mailed within 60 days of the date the claim was received or must the denial be received within 60 days of the date the claim was received? There are on-property and other awards on both sides of the question. This Board has focused on the on-property awards. Public Law Board 3460, Award No. 18, a 1985 award with I. M. Lieberman as Neutral Referee, in essence found the mailing date, not the receipt date, of a denial of a claim to be the critical date. Public Law Board 4370, Award No. 63 involved the claim of a dismissed employee, with the denial admittedly coming after 60 days. The 1997 award, Herbert Marx, Referee, treated the claim as a continuing claim to be sustained until the date of the tardy denial. The following year in Third Division Award No. 32889, Gerald Wallin, Neutral Referee, chaired a Board that considered separate suspension and dismissal claims involving the same claimant. The Board found that NDCD 16 did not apply to the finite suspension claim, where denial was untimely, but did apply to the dismissal claim, which involved continuing liability. In essence, the Third Division Award followed precedent set by the 1997 PLB award.

On the other hand, in 2006, Third Division Award No. 32811, Peter Meyers, Neutral Referee, considered a dismissal case in which the denial of a claim was mailed within 60 days but received on the 61st day after the Carrier received the claim. The Board, with Carrier members dissenting, found a violation of Rule 42.A. Third Division Award No. 37842 followed the above-noted award in 2006 and involved an alleged failure to properly bulletin a vacancy. The Board, Ann Kenis, Neutral Referee, noted that the Carrier received the claim on June 28, 1999 and responded with a denial on August 27, 1999. The Board did not resolve the “mailed/received dilemma,” finding instead that the Carrier could not show compliance with Rule 42.A because there was no evidence of “when or how” the denial letter was dispatched so that the Carrier could not show that the 60-day requirement had been met.

Third Division Award 32889 explained that “We follow this [Marx Award] precedent because to do so provides the parties with a greater degree of certainty and predictability in their claims handlings process.” This Board, subscribing to the reasoning expressed in the Third Division Award, follows the precedent set in the latest, definitive on-property award, and thus finds a violation of Rule 42.A.

AWARD

Claim sustained.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an award favorable to the Claimant(s) be made. The Carrier is ordered to make the Award effective on or before 30 days following the postmark date the Award is transmitted to the parties.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 12th day of July 2017.